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No. 555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1952

LEO BROWN, individually and as guardian ad litem for Joseph J. Brown, a minor, and JOSEPH J. BROWN,

Petitioners,

v.

CONTINENTAL CASUALTY COMPANY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

(References are to the printed record)

Respondent (Continental Casualty Company), sued Browns (petitioners) for declaratory relief that their personal injury claims were outside the coverage of an automobile liability policy and "riders" it had issued to one Aetna Freight Lines, Inc. (a contract motor vehicle freight carrier).

The gravamen of that complaint was that one Lapply, who hauled freight for Aetna in a trailer, had driven his

own tractor-truck without a trailer from Aetna's Chicago terminal over into Indiana to attend a movie, and while driving alone on that personal mission had injured Brown, Jr. This occurrence, the complaint alleged, was outside the policy provisions. (Rec., pp. 1 to 34)

To that basic Continental-Brown controversy, Aetna and Laipply were joined as defendants.

Petitioners err in stating the case was commenced March 22, 1952. The date was March 22, 1951. (Rec., p. 1)

Petitioners overlook in their summary statement that each defendant in his separate answer prayed affirmative and separate relief against Continental.

Browns asked for a construction of the policy and a decree that if they recovered judgment against either Laipply or Aetna they have a right to proceed against Continental. (Rec., p. 42)

Laipply and Aetna prayed for an order requiring (a) Continental to defend them against the Browns, and (b) that Continental be ordered to pay any judgment Browns might recover. (Rec. pp. 36 and 37-38)

In the Circuit Court, Browns disclaimed any interest in who should defend Aetna by saying in their brief

> "no reason arises for declaratory relief to determine such moot and settled question"

and that as to them such issue

> "could not stand as a ground for invoking the jurisdiction of the court for declaratory relief"
>
> (Page 6, Petitioners' Circuit Court Brief on Motion to Dismiss.)

After trial, the district court on May 28, 1952, decided against the defendants' separate affirmative prayers. Its decree reads:

> "Upon the foregoing Findings of Fact and Conclusions of Law, it is now adjudged and declared that none of the defendants, George A. Laipply, Aetna Freight Lines, Inc., Joseph J. Brown, Leo Brown, as next friend of Joseph J. Brown, a minor, and Leo Brown, have any rights of any kind against the plaintiff under the policy of insurance described in the foregoing Findings of Fact and by reason of the occurrence on June 25, 1950, described in the said findings. . . ." (Rec., p. 49)

That judgment was never modified in any way.

Laipply (the tractor owner and driver) filed nothing more. Within ten days Aetna filed a restricted alternative motion which the Circuit Court described as:

> "an alternative motion for a new trial or for an amendment of the judgment to provide that Continental, although affording no insurance coverage for the occurrence that caused the injury to Brown, Jr., was under a contractual duty to pay the expenses of Aetna Freight Lines, Inc. in defending against the Brown claims."

The grounds of that motion were directed at the question of Continental's alleged obligation to defend Aetna, and the findings that Laipply was on a pleasure mission were accepted. (Rec., pp. 49-51)

Browns did nothing at all within ten days after the entry of decree, but on the twelfth day (Monday, June 9, 1952) mailed from Chicago to Indiana their new trial motion. (Rec., p. 57)

They admitted in the trial court

> "that the 10 days thereafter for the filing of the motion for a new trial ended Saturday, June 7, 1952"

but claimed Saturdays were dies non and hence that a Chicago mailing on the following Monday met time requirements. (Rec., pp. 58-59)

Continental on June 11, 1952, moved the trial court to strike the Browns' new trial motion as tardy or alternatively to overrule it. (Rec., pp. 57-58)

On August 1, 1952, the trial court corrected a clerical error in Finding No. 8 and overruled the Brown and Aetna motions. (Rec., pp. 59-61) Browns alone filed notice of appeal. (Rec., p. 62)

On Continental's motion the Circuit Court on November 20, 1952, dismissed Browns' appeal as tardy and on December 3, 1952, refused to vacate that dismissal. (Rec., pp. 166-167 and 185)

The evidence that Laipply was on this personal movie mission was undisputed (Rec., pp. 78-88) and the alleged obligation to defend under the policy pertained only to Aetna. (Rec., pp. 9-10)

ARGUMENT

Browns' certiorari petition assigns but three questions (orig. pp. 5 to 6 thereof), but their brief assigns five grounds (orig. pp. 9 to 14 thereof).

Precedents and a rule of this court restrict Browns to the precise questions in the petition itself and accordingly only those are involved.

Further, since Browns make no point of the trial court's correction of the clerical error in Finding No. 8, respondent passes that question.

Similarly, it is to be noted that Browns cannot reach the ruling of the Circuit Court unless upon the whole record they show that their substantial rights were affected.

> Rule 61 of Rules of Civil Procedure, 28 U. S. C. A., Sec. 2111.

Subject to the foregoing, respondent thus answers Browns' brief:

I

THE RECORD IN THIS CAUSE WAS SERVED OUT OF TIME

The Circuit Court dismissed this appeal November 20, 1952 (Rec., pp. 166-167).

Petitioners filed their certiorari petition and with a brief and the typewritten record and served all except a copy of the record on January 21, 1953.

By rule 38 (3) of this court the printed record was to be served within 10 days thereafter.

It was not served until February 28, 1953. Respondent has had no notice of any application to extend the time for service or of the granting thereof and therefore assumes there was no extension.

II

BROWNS ERR IN THEIR ASSERTION THAT THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Browns contend the decision below conflicts with *Bowman v. Loperena*, 311 U. S. 262 with *Wayne United Glass Co. v. Owens-Illinois Glass Co.*, 300 U. S. 132.

There is no such conflict because:

(1) The present amended Rule 73a restricts consideration to "timely" motions. It therefore necessarily supersedes all prior cases such as *Bowman* and *Wayne Glass* that dealt with "entertaining" tardy motions.

(2) Under the present rule direct precedents of this tribunal deny any power in a trial court to "entertain" anything not expressly assigned within ten days.

> Johnson v. New York, N. H. & H. R. Co. (1952), — U. S. —, 79 S. Ct. 125, 127, and cases there cited.

(3) *Bowman* and *Wayne Glass* were bankruptcy cases where, because of the absence of court terms, the trial court had a continuing revisionary power and could, if it saw fit, "entertain" a motion at any time.

The current Rule 73a as amended eliminates, however, all questions of tardy "entertaining" and denies any such power in the courts.

> **Rule 73a as amended and Notes of Advisory Committee thereon;**

Brennan v. Hawley Products Co. (7th), 182 Fed. (2nd) 945, cert. denied 340 U. S. 865, 71 S. Ct. 89;
Francis v. So. Pac. Co. (10th), 162 Fed. (2d) 813, aff'd 333 U. S. 445;
Fine v. Paramount Pictures (7th), 181 Fed. (2d) 300;
Marshall's U. S. Auto Supply, Inc. v. Cushman (10th), 111 Fed. (2d) 140, cert. denied 311 U. S. 667;
Safeway Stores, Inc. v. Coe (App. D. C.), 136 Fed. (2nd) 771;
Freid v. McGrath (App. D. C.), 133 Fed. (2nd) 354.

III

BROWNS ERR IN THEIR ASSERTION THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH A DECISION OF THE SEVENTH CIRCUIT ITSELF

To this contention Browns cite *Denholm & McKay Co. v. Com. of Internal Revenue,* 132 Fed. (2nd) 243, 246-247, in the 1st Circuit, and *Babler v. U. S.,* 137 F. (2nd) 98, 99, in the 8th Circuit.

Neither conflicts with the decisions below and both were before the present Rule 73a which denies jurisdiction over tardy motions.

McKay mentioned no rule of Civil Procedure and therefore can construe none. It was an appeal from the then Board of Tax Appeals.

Insofar as it has the slightest pertinency it supports the decision below by holding that where the time for a motion has passed, the trial court cannot after the appeal period

entertain the motion, and if it does so, its act is void jurisdictionally and does not toll the appeal period.

The *Babler* case is even more remote because the trial court had expressly kept the finality of its judgment open. Further, *Babler,* says the Notes of the Advisory Committee, is no longer acceptable under Amended Rule 73a.

Petitioners claim the decision below conflicts within the 7th Circuit itself with *U. S. v. Schlotfeldt,* 136 Fed. (2nd) 935, cert. denied, 327 U. S. 781.

Passing the question of whether a court can legally conflict with itself, *Schlotfeldt* antedated the present amended Rule 73a which denies jurisdiction to "entertain" tardy motions. As to the present rule, the Advisory Committee's Notes state:

> "Rulings or dicta to the contrary as in U. S. v. Schlotfeldt (CCA 7th 1943), 136 Fed. (2nd) 935; Babler v. U. S. (CCA 8th 1943), 137 Fed. (2nd) 98, dictum . . . are not acceptable in light of these considerations . . ."

The 7th Circuit itself clearly recognizes that under the present amended rule, tardy motions do not toll the appeal period.

> Brennan v. Hawley Products Co. (7th), 182 Fed. (2nd) 945, cert. denied 340 U. S. 865;
>
> Fine v. Paramount Pictures (7th), 181 Fed. (2nd) 300.

IV

BROWNS ERR IN ASSERTING THEY COULD NOT APPEAL UNTIL THEIR UNTIMELY MOTION WAS DECIDED AND UNTIL AETNA'S SEPARATE AND TIMELY MOTION WAS DECIDED

Browns argue that (a) their own untimely motion prevented an appeal, and (b) that Aetna's timely but restricted motion prevented a Browns appeal.

As to their contention that their own untimely motion somehow tolled their appeal period until it was overruled, this, if sustained, would abrogate the present Rule 73a restricting jurisdiction of trial courts to timely motions and would re-establish the discarded rule as to "entertaining" tardy ones.

Most certainly no one lulled Browns into believing their tardy motion was effective because only one day after it was filed Continental filed its motion to strike the Browns motion as tardy. (Rec., pp. 57-58)

All the authorities belie any justifiable concern by Browns that somehow the court might sustain their untimely motion and thereby obviate an appeal because the cases are uniform that any such attempt by the trial court would be beyond its jurisdiction.

Safeway Stores, Inc. v. Coe, (App. D. C.) 136 F. (2d) 771;
Marshall's U. S. Auto Supply v. Cushman, (10th) 111 F. (2d) 140, cert. denied 311 U. S. 667;
Freid v. McGrath (App. D. C.), 133 F. (2d) 350.

The 7th Circuit is itself on record there no longer can be any "entertaining" of tardy motions.

Brennan v. Hawley Products Co. (7th), 182 Fed. (2d) 945, cert. denied, 340 U. S. 865, 71 S. Ct. 89; Fine v. Paramount Pictures (7th, 1950), 181 F. (2d) 300.

Browns would have the appeal period controlled by the parties and not by rule. Under their theory a party could at any time revive an expired appeal privilege by the simple expedient of any untimely motion.

Browns had a clear option. They could either file notice of appeal within 30 days after May 28, 1952, or if they desired more time, they could within 10 days after decree serve a motion that would extend their appeal time. Having done neither they cannot complain of their own decision. Neither Aetna nor Continental nor the court itself could or did control either of those steps.

Browns' cases are not in point. *Jordan v. Fed. Farm Mtg. Corp.*, 152 F. (2d) 642, holds that only in strictly two party litigation, a party who has himself already appealed cannot later file a motion for a new trial.

Bergeron v. Mansour, 152 F. (2d) 27, is to the same effect; that is, a party who has himself already appealed cannot re-argue his motions in the trial court.

Daniels v. Goldberg, 173 F. (2d) 911, mentions no rule of Civil Procedure.

Smith v. Pollin, 194 F. (2d) 349, adheres to the rule that a party who has himself appealed can file nothing below, but holds that if he learns of grounds for a new trial for newly discovered evidence he is not without a remedy and may move to remand the case to the trial court.

U. S. v. Radice, 40 Fed. (2d) 445, 446, was decided in 1930 before any Rules of Civil Procedure were adopted.

Browns say that they should not be prejudiced by any delay of the trial court in acting on their motion.

In the first place no delay on an untimely motion can prejudice anyone; in the second place they claim no effort on their part urging an immediate ruling; in the third place their trial court counsel asked a delay in the ruling.

Browns postpone their discussion of the effect of Aetna's restricted and timely motion to subdivision IV of their brief. Respondent adopts a like practice.

V.

BROWNS ERR IN THEIR ASSERTION THAT IF ANY DEFENDANT FILES A MOTION THAT STAYS THE APPEAL TIME AS TO HIM, THIS AUTOMATICALLY EXTENDS THE APPEAL PERIOD FOR ALL DEFENDANTS EVEN THOUGH THE OTHERS FILE NOTHING AND EVEN THOUGH THE PARTY WHO FILED THE TIMELY MOTION DOES NOT APPEAL.

Browns cite no precedent they even claim sustains their contention. None exists that an appealing defendant can take advantage of an extension of time procured by a non-appealing one.

Browns overstate the question. It is actually a very narrow one.

Aetna accepted the determination that Laipply was a stranger to it in the occurrence and complained only that Continental should defend it.

> Central Surety and Ins. Co. v. Morris (5th), 103 Fed. (2d) 116;

Ocean Accident and Guarantee Corp. v. Heald, (D. C. E. Pa.), 30 Fed. Supp. 991.

As decided in the *Heald* case, if Aetna had been sustained in that claim, relief would have been limited to that one issue between Aetna and Continental.

Browns make no claim here of any interest in that Continental-Aetna issue.

From the denial of that relief Aetna did not appeal and the appeal of Browns from the denial of affirmative and other relief to them is utterly foreign to that Aetna-Continental controversy.

Accordingly, on this record, the question is only:

> Does one defendant's motion for limited relief from a judgment on an issue only between him and the plaintiff and from the denial of which he does not appeal, toll the appeal period as to another defendant who did not join therein, but who seeks to appeal on other grounds from a denial of affirmative relief to him against the plaintiff.

Nothing in Aetna's motion touched the Brown-Continental litigation at all. It could have been granted in its entirety with no change in their situation. Nothing in it prevented Browns pursuing any remedies by appeal or otherwise they thought available.

By reason of their non-joinder of Aetna in the appeal, Browns cannot and do not contend that Aetna is in any respect interested in the separate and distinct Brown-Continental controversy.

Fine v. Paramount Pictures (7th), 181 Fed. (2d) 813 expressly decides that even as to Aetna itself had it appealed it could have no relief on an unassigned ground.

Very recently this court itself has re-affirmed that even as to an appealing party his relief is restricted to that he specifically assigned below.

> Johnson v. New York, N. H. and H. R. Co. (1952), — U. S. —, 73 S. Ct. 125.

Browns however argue that an appealing party may adopt an unassigned ground of a non-appealing party and thereby not only toll his own appeal time but present that unassigned ground for review.

Direct precedent denies that a timely motion by one defendant tolls the appeal period as to all.

That is *Continental Casualty Co. v. U. S. for use of Schaefer,* 167 Fed. (2d) 107, cert. denied 337 U. S. 940, 69 S. Ct. 1517. It decides that even where all defendants appeal, a timely motion by one tolls the appeal time as to the others only on an issue that cannot be resolved in favor of that one without in justice giving the same relief to all. As to an issue not so controlled its holding is that no one can thus secure a time extension by a motion by anyone but himself.

Zimmern v. U. S. (5), 79 Fed. (2d) 703, rev'd on other grounds 298 U. S. 167, 56 S. Ct. 706, also decides that even a timely motion by one appellant does not toll the appeal period as to others.

Everything Aetna asked in its restricted motion could have been granted with no effect on Browns who had no possible interest in who must defend Aetna. The basic trial court findings that Aetna had no connection with Laipply on his movie mission were as favorable to Aetna as to Continental and all those Aetna accepted.

Surely, if Continental had sued Aetna alone on the one issue of who must defend Aetna against the Browns

but had joined the Browns in its complaint, a motion to dismiss by Browns for failure to state a cause of action against them would have had to be sustained.

If the rules are to be construed as Browns argue they should, the door is open to endless litigation over their meaning.

Thus, if one of multiple defendants file a timely motion for new trial and later concludes to withdraw his motion and does so, co-defendants such as the Browns might then be here urging that although they filed nothing at all in the trial court their appeal period ran from the withdrawal of another defendant's timely motion.

Procuring an extension of time for an appeal should be and is an individual undertaking just as procuring an extension of time to plead applies only to the party securing that extension.

The Browns' assertion in their petition for certiorari (but not in their brief) that "important questions of federal law and practice or presented" merits only passing attention.

In the first place, if the question be "important" it has been definitely settled by *Continental Cas. Co. v. U. S., etc.* 167 F. (2d) 107, cert. denied 337 U. S. 940.

In the second place, the rules themselves settle it. Browns would have the certainty of the rule abandoned in favor of a rule that "sometimes" a timely motion by a non appealing defendant tolls the appeal period as to another defendant and "sometimes" it does not.

It is submitted that when, as and if any such amendment becomes proper, it should be done only by an express

amendment of the very rules themselves and that their present form permits no such construction.

The bench and bar presently understand the rule. Any permitted deviation from it can only lead to the confusion the Browns profess to fear.

VI.

BROWNS ERR IN THEIR ASSERTION THEIR MOTION FOR A NEW TRIAL WAS SERVED IN PROPER TIME

This last subdivision of Browns' brief contends that if the last day for serving a new trial motion falls on a Saturday, the 10-day period is extended to include the following Monday.

They cite as supporting that contention *Union Nat'l Bank of Wichita, Kansas v. Lamb,* 337 U. S. 38, 69 S. Ct. 911. That, however, was a Sunday and not a Saturday case.

They overlook the rule:

> "A half holiday shall be considered as other days and not as a holiday."
>
> Rule 6a

and *Casalduc v. Diaz* (1st), 117 Fed. (2d) 915, cert. denied, 314 U. S. 639, 86 L. Ed. 512, with its express holding that when Saturday is the last day for an act even if the clerk's office be closed the time is not extended.

Browns make no claim there is any Saturday closing practice in the office of the District Court Clerk at Hammond, Indiana, or in that of Continental's counsel at Gary, Indiana, nor do they claim that either of those offices were in fact closed on Saturday, June 7, 1952. Similarly, they

make no claim that the United States Post Office in Chicago, Illinois, was not open on that date for mailing their motion.

A denial of Browns' petition is prayed.

Respectfully submitted,

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